IN THE SUPREME COURT OF THE UNITED STATES

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KOONS BUICK PONTIAC GMC, INC., :

Petitioner :

v. : No. 03-377

BRADLEY NIGH. :

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Washington, D.C.

Tuesday, October 5, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

DONALD B. AYER, ESQ., Washington, D.C.; on behalf of the Petitioner.

A. HUGO BLANKINGSHIP, ESQ., Alexandria, Virginia; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-377, the Koons Buick Pontiac v. Bradley Nigh.

Mr. Ayer.

ORAL ARGUMENT OF DONALD B. AYER

ON BEHALF OF THE PETITIONER

MR. AYER: Mr. Chief Justice, and may it please the Court:

This is a straightforward case of -- of statutory construction in which the words, context, purpose, and history of the statute in question all point to a single meaning that is contrary to the conclusion reached by the court below.

The case concerns the Truth in Lending Act's basic statutory damages provision, 1640(a)(2)(A)(i), or little (i) I'll call it here, which since the statute's enactment, has allowed individuals to recover from lenders who violate the act an amount equal to twice the finance charge, but limited to a range of $100 to $1,000. This statutory damage recovery is available under the act without regard to actual injury or intent or fault by the lender. In addition to statutory damages, the act provides for actual damages to be available,

administrative agency enforcement, and criminal penalties.

I want to just talk briefly about the history of the act because I think it's -- it's critical to understanding the issue before the Court, and I'll refer to places where we've quoted it in the blue brief.

As enacted in 1968 -- and this provision appears at the bottom of page 5 of our brief up to the top of page 6. The provision I've described was the only statutory damage provision, and it was followed by language that indicated -- and I should say it appeared -- and this is important -- at that time, in section 1640(a)(1) and began right there after the (1). And the limitation of liability that appears there says the words that liability under this paragraph shall not be less than $100, nor more than $1,000.

That section was first amended in 1974, and the amended language appears at the top of page 7 of our brief. And what happened in 1974 was that this provision -- the actual words of the provision were not changed except for one, but it was moved because other things were added to the statute. And it now became -- instead of 1640(a)(1), it became section 1640(a)(2)(A). The only change in the provision, the only word changed was the change from the word paragraph -- liability under this paragraph -- to the -- to the word subparagraph.

The next amendment -- and then the -- the statute after this then stood for nearly 20 years unchanged at all.

JUSTICE STEVENS: Can I interrupt you right there?

MR. AYER: Yes, Your Honor.

JUSTICE STEVENS: What did the word subparagraph describe in the 1974 statute?

MR. AYER: It -- it described subparagraph (A).

JUSTICE STEVENS: Subparagraph (A).

MR. AYER: Yes.

JUSTICE STEVENS: Okay.

MR. AYER: And I'll explain --

JUSTICE STEVENS: That's the small (a), isn't it?

JUSTICE O'CONNOR: Capital (A). Capital (A)?

MR. AYER: That's capital.

JUSTICE SOUTER: Which had -- which had two -- two subparts --

MR. AYER: Not in '74, Your Honor. In -- the next --

JUSTICE SOUTER: Oh, I'm sorry. Okay.

MR. AYER: In 1976 --

JUSTICE SOUTER: After the amendment in '76 --

MR. AYER: Correct.

JUSTICE SOUTER: -- it described the --

MR. AYER: Precisely correct. And what was done in '76 was Congress passed the Consumer Leasing Act, and it added a second, I'll call it, (ii). I'm sorry. It added an (i) in front of the original provision, so it was then 1640(a)(2)(A) -- capital (A), little (i). And then in '76, (ii), and the (ii) was a provision not really relevant here except that it's in the middle of what we're talking about. It dealt with leases and had a formula with regard to leases.

It is uncontested by any court certainly that from that time forward to 1995, the cap that appeared then at the end of -- of little (ii) applied to both sections -- I'm sorry -- clauses (i) and little (i), and that limitation --

JUSTICE O'CONNOR: Was it ever challenged or was this just a common assumption? Was that ever --

MR. AYER: Well, there are --

JUSTICE O'CONNOR: Was that issue litigated?

MR. AYER: Your Honor, there are a number of -- of cases that applied it presumably to plaintiffs if they thought they had an argument, would have liked to argue they could have gotten more than $1,000, but there -- there are a bunch of cases we've cited in our brief that -- that show that that was the consistent interpretation.

JUSTICE STEVENS: Let me just be sure. You're going a little fast, and I want to be sure I follow you.

During the period between 1976 and 1995, in your view the term subparagraph still referred to capital (A) and to both subparts of that subparagraph.

MR. AYER: Correct, actually clauses, Your Honor, but that's correct, yes.

JUSTICE STEVENS: All right.

MR. AYER: What then happened in 1995 -- and this -- the actual enactment appears in the blue brief at page 10, footnote 6, and this is also I think important. What Congress did -- and they were in the midst of a series of amendments relating to mortgages that was made necessary -- the range of them necessary by a court of appeals decision that created quite a crisis of threatened liability to the mortgage industry.

In this respect here -- they enacted a lot of other things, but with regard to this provision, as footnote 6 indicates -- and it's mostly over on page 10 -- all they did -- they did not even reenact the preexisting provision. They simply said move the or from the middle of that provision to the end and insert the following language, and the following language was the expression of an intent to increase the cap on a class of loans that had actually previously been included in the -- in the

overarching provision that relates to loans, which is the original one that we're talking about here that deals with twice the finance charge, capped at $1,000. They added the language that essentially says, relating to a credit transaction not under an open end credit plan that is secured by real property, i.e., a mortgage, not less than $200 nor greater than $2,000. And in that respect, they clearly acted to provide a higher cap with regard to mortgage transactions and to pull those out of the first section and into the last.

JUSTICE O'CONNOR: Well, Mr. Ayer, if I just read the statutory language as it appears now, the impression I get is that the language in capital (A), little (ii), except that the liability, just applies to little (ii). You have to rely on kind of a -- a word of art in the use of subparagraph to reach a contrary result it seems to me.

MR. AYER: Well, Your Honor, we -- we have -- and -- and your reasoning -- and I'll -- and I'll expand on it slightly. The reasoning of the court below -- and it's essentially a syllogism I think, and it's -- it's not far from what Your Honor has just said. It is essentially that, well, the reference to subparagraph formerly did refer to subparagraph (A). Now Congress has added clause (iii) which -- with its own cap. So the limitation to

$1,000 clearly cannot apply to clause (iii). Therefore, it can no longer apply to all of clause (A). Therefore, it must refer to something. What does it refer to? It has to refer to clause (ii) only.

And the problem with that is essentially threefold, and I'll -- I'll go through them quickly and then expand upon them, if I can.

The first is that, as -- as Your Honor has stated, the word subparagraph -- I won't call it a term of art, but it has a very clear, specific meaning in the context of this provision. That's the first point.

The second point --

JUSTICE GINSBURG: May -- may I stop you at that point? Because you did introduce this neat drafting, the set of words, section, subsection, paragraph, subparagraph, and clause.

MR. AYER: Correct.

JUSTICE GINSBURG: Had you introduced -- have you argued before the Fourth Circuit those drafting manuals?

MR. AYER: No, Your Honor. We did -- we did not. And let me -- let me just explain what -- we've been trying to think about how to understand those manuals, and the best -- the best idea I've heard from anyone is to refer to them as a sort of a Rosetta stone. They're not

really dictionaries. They're not really, I -- I wouldn't say, authoritative statements of the way words are always used in Federal statutes because in fact you can find exceptions. You can find mistakes. You can find departures.

But they are a tremendous aid in -- what -- what it tells you is that the folks who are drafting legislation as technicians have in mind a hierarchy of these terms, and they try very hard to use them in a consistent manner, and they have for the last 50 years because we have books that go back to 1954 that do this. And so the question becomes, with that in mind, when you look at what else you know, does that help you understand what the word means?

JUSTICE SCALIA: The problem I have, Mr. Ayer, is I don't -- I can accept your belief that -- that subparagraph refers to all of (A) and yet still agree with the respondent here or with the court below because what -- what limits the -- the phrase, shall not be less than $100 nor greater than $1,000 -- what limits it to subpart (2) is not the word subparagraph but rather the fact that it is an exception only to (2). The liability under little -- what you've called -- what -- (ii) --

MR. AYER: Right.

JUSTICE SCALIA: The liability under (ii) is a

liability under this subparagraph, and the exception to little (ii) is only an exception to little (ii). So I can read under this subparagraph to mean perfectly, exactly what you say it means, in the case of an individual action relating to a consumer lease the -- the liability would be 25 percent, except that -- that is an exception from what we've just said -- liability under this subparagraph, which includes (ii) --

MR. AYER: Well, now, that was a bit -- all of that was true prior to 1995.

JUSTICE SCALIA: Well, that may be, but now you're -- now you're relying on -- on the -- on the statutory history argument rather than on the mere meaning of the word subparagraph. What I'm suggesting is I can -- I can concede that subparagraph means what you says -- say it means.

MR. AYER: It refers to a section with a capital (A).

JUSTICE SCALIA: Refers to all -- all of (A).

MR. AYER: Okay.

JUSTICE SCALIA: But when that phrase is used in an except clause that only applies to little (ii), it -- it still says the -- the foregoing liability under this subparagraph, that is, the liability contained in little (ii) --

MR. AYER: Let me go --

JUSTICE SCALIA: -- which is a liability under this subparagraph. Isn't it?

MR. AYER: Well, it is, Your Honor. I -- I'm having trouble following that, Your Honor.

And let me go back, if I could, to 1974 which -- and let -- and let me say one more thing about 1974. The last time this limitation was actually enacted by Congress, was actually put into words and put into a piece of legislation, as opposed to adding ornaments to it or things in between, or this or that, was in 1974. In 1974, all they did with this provision was move it into a new section that had an (A) in front -- a capital (A) in front of it and out of one that had a (1) in front of it. And they changed the word from paragraph to subparagraph. And I would suggest the Rosetta stone or the stones in these manuals that tell us what they tend to want to have in mind when they're doing this tell us exactly what they were thinking about when they put the word subparagraph --

JUSTICE SOUTER: But even if we don't accept that -- and I -- if you're going to reach this, I -- I don't want to spoil your sequence, but even if we don't accept the Rosetta stone, in order to get to the -- to the position below, you've got to read subparagraph to refer to what we would normally call a clause.

MR. AYER: Absolutely, Your Honor. Completely correct. I -- that -- I can't say it better, and I won't.

The -- a couple things I will say that are important are that when you go through the true -- a standard way of reading legislation, if you want to know what a word means, is you read the rest of the legislation in issue. When you read the rest of the legislation in issue and you find that there are a total of 37 references to the word subparagraph, and 36 of them, without any ambiguity at all, refer to a letter -- a -- a provision that starts with a capital letter. If you read the entire United States Code, you can find some instances where there are departures from this standard way of speaking. A number of them, frankly, are in statutes back to the '40's and '30's, but some are still -- there are mistakes in various places. But again, the convention that's laid out in these manuals is the one that the courts tend to follow.

JUSTICE SCALIA: But that convention, it seems to me, is much less strong than the fact that you don't read a word to mean one thing for purposes of one part of the -- of the whole paragraph and another thing for the purposes of the rest. If -- if you read it the way you want us to read it, it would apply to little (iii) as well.

MR. AYER: Well, I mean, I think that that's the next thing --

JUSTICE SCALIA: And that is simply a flat contradiction.

MR. AYER: Well --

JUSTICE SCALIA: And -- and the -- the reading given by the court below produced no flat contradiction in the terms of the statute.

MR. AYER: Well, it -- it flatly contradicted the standing meaning of the word subparagraph. It ignored the standing meaning.

JUSTICE SCALIA: No -- no contradiction within -- within the statute itself.

MR. AYER: Well --

JUSTICE SCALIA: It may have given what you call the Rosetta stone a different meaning, but it did not produce a -- a contradiction in the terminology of the statute, whereas yours does. You want us to read subparagraph to mean all of (A) except not for purposes of (iii). You want us to do it for purposes of (ii) but not for purposes of (iii).

MR. AYER: Well, Your Honor, I think that the principle or the canon that the specific controls the general is one that -- that Your Honor set forth in the -- in the Casey case, and many other cases have asserted it.

What went on here in 1995 I think is easy to discern. What it -- what it was was they wanted to have a higher cap on mortgage loans than on other kinds of loans, and so they glued a provision on the back. Was it done elegantly? Was it done as clearly as it might have been? No, but as the Court said in -- in the Lamie case, it's awkward but it's still straightforward in terms of meaning.

JUSTICE SCALIA: It isn't straightforward. The -- the specific controls the general where there is an unavoidable conflict. There is no unavoidable conflict here. You --

MR. AYER: Only if --

JUSTICE SCALIA: -- you're urging that one interpretation is better than another, and if there were an unavoidable conflict, I would agree that (iii) would -- would overrule (ii), but it is not necessary to read (ii) that way.

MR. AYER: What you have to do, Your Honor, to take the approach that the court below took is ignore the established meaning of the word subparagraph. I say established because when it was enacted in 1974, it's perfectly clear why the word subparagraph was put in there.

And then what one has to do is -- is hypothesize

that the 1995 amendment, which did not reenact the original provision, but simply added something else to it -- and it wasn't something else that said we've just gotten rid of the cap on (i). It was something else that said, as to mortgages, do the following. That that by inference changed the meaning that was put in the word subparagraph in 1974 because it hasn't been reenacted since.

JUSTICE SCALIA: I don't want to have to go through the -- the legends of the -- of the legislative process every time I read a statute. If Congress wrote it this way --

MR. AYER: I thought Your Honor was --

JUSTICE SCALIA: -- it seems to me that I should interpret it the way it is written. Why -- why do I have to go back and say, oh, this is what it used to be? And when they added this word, if they made a mistake, they made a mistake, but the language reads the way it reads, it seems to me.

MR. AYER: Well, I mean --

JUSTICE SCALIA: It's not my job to correct their mistakes.

MR. AYER: Again, I -- I -- all I can say is that it -- it seems to me that we really do need to look at the meaning of the word subparagraph at the time it was

enacted by Congress. That meaning in 1974 is utterly clear. And what -- the only way you can get to the conclusion of the court below is by saying in 1995 Congress somehow or other changed the meaning that was put in the statute in 1974, and they did it without ever saying they were doing it.

JUSTICE STEVENS: May I ask you, Mr. Ayer, does your opponent agree that prior to the 1995 amendment, the word subparagraph in the (ii) part of (2)(A) referred to (i) as well as (ii)?

MR. AYER: I am not positive if they do agree with that. The only thing I can say for sure is that every court that has ever addressed the issue does agree with that. And I -- and I -- I think they may have said something in their brief to question that.

JUSTICE O'CONNOR: Could we talk about the facts of this case? Would -- would your client fall under little (i) as a result of what happened?

MR. AYER: Yes, Your Honor.

JUSTICE O'CONNOR: And the limit there would be twice the amount of any finance charge in connection with it --

MR. AYER: Correct.

JUSTICE O'CONNOR: Unless the except provision applies.

MR. AYER: That is correct.

JUSTICE O'CONNOR: And what would that dollar amount be here?

MR. AYER: Well, that -- that dollar amount in this case -- and -- and the judgment as it now stands is over $24,000. So we --

JUSTICE O'CONNOR: And you argue that the limitation is $1,000.

MR. AYER: Correct, Your Honor. And -- and the -- the last major reason -- the -- just to summarize, the -- the two -- first two reasons I think I've given now for why the decision below must be wrong are, first, that for all the reasons I've tried to point to, the word subparagraph really has quite a specific meaning, thankfully, in the place we're talking about it appearing. And -- and it refers to a section starting with capital letter.

Second point --

JUSTICE GINSBURG: What about the argument that this drafting manual that you're relying on for the meaning of paragraph, subparagraph, clause wasn't -- what was the year it was published?

MR. AYER: Well, there -- there are two, Your Honor. One was published in the -- I believe the House manual was published in 1995 and actually was published a

month after the enactment of the statute. The Senate manual -- but there -- but there was a prior version of it, and this version was in fact in draft form at the time. But the -- but the real -- the point I want to -- and -- and the Senate manual was in fact --

JUSTICE GINSBURG: Because the argument is that these manuals came out after this TILA statute.

MR. AYER: Right, Your Honor.

But -- but we also in footnote 15 and in the text on that page refer to a whole collection of books, drafting books, mostly dealing with Federal legislative drafting, and all uniformly saying -- and again, we're not trying to say that these are binding authority. We're simply trying to say that in the -- in the process of Federal legislative drafting, this is what the legislative draftsmen try to do, and then you look at the statute and you look to see what they in fact have done. And you see that this provision is there for a very particular reason. And so we're not trying to trump up these manuals as -- you know, as part of the code or anything else. We're simply trying to say they -- they give you a real good guidance on what it means. And then when you look at the statute and you see that the statute consistently uses them in that way, uses the word in that way, you've got a good start on understanding what it means.

The -- the last thing I want to say deals with, as I guess in the order I should be talking about it, legislative history. And there are two points on that.

One is in 1995 by adding clause (iii), Congress added -- created a provision. Again, I want to emphasize what they did is they pulled out of part (i), or clause little (i), which dealt with loans in general and said twice the finance charge -- it pulled out the category of loans that were mortgage loans, and it said we want to impose a higher cap on those loans. And there is legislative history that we cite in our brief that indicates that that was what they were thinking about.

If they had intended to eliminate, entirely eliminate, not -- not increase from $1,000 to $2,000, but entirely eliminate the cap on the entire category of -- of loans, two things would be true.

Number one, somebody would have said something about it surely. This is the dog that didn't bark, as this -- many members of this Court have -- have observed. And there's not a breath of a thought in any legislative history that anybody meant to do this.

And the second point, which is even perhaps more telling, is that if they had done that, they would have contradicted the clear purpose of what they did. They wanted a higher cap on mortgage loans than on loans in

general, and it's clearly the case that if they had eliminated the cap on loans in general, they would have a lower cap on mortgage loans.

JUSTICE O'CONNOR: Would there be any conceivable reason why Congress would have wanted a higher damages award for hard-to-detect misconduct of the type under little (i)?

MR. AYER: Your Honor, I mean, there's a lot of speculation in a number of the briefs. You know, there's speculation about, you know, inflation and -- and there's all sorts of things that one could talk about endlessly if one wants to talk about policy. I -- I think the answer is basically no. I think there's really no good reason to distinguish between, you know, no cap on (i) and a cap on (ii). And I'm prepared to argue this, but I think it's way down in the noise level in terms of what -- what is relevant here.

The -- the last point that I think I would -- I would like to make is just that if the Court decides to reverse and if the Court were to decide that -- that $1,000 cap is in fact -- has always been and continues to be the law, we would simply ask the Court also to remand with regard to the attorney fee award. The situation in this case would then be that the plaintiff, or the respondent, will have recovered $5,000. The petitioner

will have recovered affirmatively the other way $3,900. It's a net -- a net of $1,100. And the court below reduced the fees at a time when the recovery for the plaintiff was $29,000, reduced them by 40 percent on the ground that plaintiff's counsel had -- had raised 40-some claims, all of which failed, except for 2, and basically indicated that that was a strong reason for reducing the claim. I would submit if they essentially recovered $1,000 in this case, that that would be a reason to submit it back to the trial court.

If there are no further questions, I will reserve my time.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Ayer.

Mr. Blankingship, we'll hear from you.

ORAL ARGUMENT OF A. HUGO BLANKINGSHIP

ON BEHALF OF THE RESPONDENT

MR. BLANKINGSHIP: Mr. Chief Justice, may it please the Court:

Petitioner's starting point is not the starting point established by this Court. The starting point in this case established by this Court in the Lamie decision and those prior is clearly the statute before you. He talks of history. He talks of what happened in the past. The issue before this Court is what does the statute we have mean.

JUSTICE O'CONNOR: Well, what -- what do you think the term, this subparagraph, meant before 1995?

MR. BLANKINGSHIP: Justice O'Connor, I'm not certain what it meant. What I first read it --

JUSTICE O'CONNOR: Do you agree that the courts had interpreted it to apply to both little (i) and (ii)?

MR. BLANKINGSHIP: I agree that that's what the opinions in the Dryden and the Mars case said, but I would point out that in both of those cases that was not the issue before the Court. In those cases, the plaintiff had lost down below. There wasn't an issue of damages, and when the circuit court sent them back, they told them what the measure of damages was without any discussion.

I personally, when I read the statute and first started this practice, thought that it was limited to (ii). I then did some research --

JUSTICE SOUTER: Well, isn't the difficulty with that -- that the point that I raised with Mr. Ayer? To take that position before the most recent amendment and now, you've got to say that the word subparagraph refers to the section of one sentence which, regardless of legislative drafting manuals, I -- I think anybody would say, well, it's a clause, and to call a clause a subparagraph is a stretch, at least in the absence of a very clear provision somewhere in the statute that says

when we use the word subparagraph, we include clause. That -- there's a basic implausibility, I guess I find, in using subparagraph at any point in the statute to refer to a mere clause.

MR. BLANKINGSHIP: Well, the answer is this subparagraph. It's not just subparagraph. It refers to this subparagraph. Thus, it is much clearer or more precise as to where it's located.

JUSTICE SOUTER: Well, no. It -- it -- that -- that completely leaves -- even in your view, that leaves open the question whether this refers to a clause or a set of three clauses. It -- it doesn't answer the question before us whether subparagraph means clause.

MR. BLANKINGSHIP: Well, the -- the answer I believe is in -- is in the context of the statute. You must look to the context of the entire statute and -- and look and see that there's obviously a conflict between (ii) and (iii).

JUSTICE SOUTER: Well, the -- you can look at that either way, it seems to me. One way is to see it as a conflict. There's no question about that.

Another way is to see it -- I think the term that has been used is carve-out. In other words, the -- the cap on damages will be such and such provided that. If you got a mortgage, the cap is going to be higher. You

can read it either way.

MR. BLANKINGSHIP: I would disagree with you because of the language, the word or. You see, when you see or that appears after (ii), after the -- after the damages --

JUSTICE SOUTER: That's -- that's the argument for your reading. There's no question about it. But it -- I don't see it as an argument that excludes the proviso kind of reading.

MR. BLANKINGSHIP: You have to understand that -- that all three of these are very, very different. They have different rules. They have different requirements, and they have different elements. They all have different --

JUSTICE STEVENS: Well, but wait a minute on that. Was that true before 1995?

MR. BLANKINGSHIP: Before 1995, there weren't -- there was not the section regarding the home mortgages.

JUSTICE STEVENS: I understand, but it was my understanding -- you correct me if I'm -- you say there are just two cases. My understanding is there are hundreds of lawyers who have practiced under statute -- under this statute, and it was generally accepted that the cap in not subparagraph but clause (ii) did apply to cases under clause (i), that everyone accepted that. And you're

-- you're saying -- should we accept that as a starting point or not?

MR. BLANKINGSHIP: I don't think you should accept it as a starting point because of the history. If you look at those cases, they were never litigated. That issue was not litigated --

JUSTICE STEVENS: You don't think this issue would -- if there was a serious question about that, you don't think that there would have been a single case that would have arisen between 1974 and 1995 that made the -- that gave this interpretation to -- I want to call it -- clause (i) and clause (ii)? It seems to me most improbable.

MR. BLANKINGSHIP: History suggests that most of those cases that came up -- and if you look at them -- in the early years were the technical cases. They were not cases that involved a lot of money. They were simply very technical, minor wording --

JUSTICE STEVENS: They couldn't have involved more than $1,000 if people read the statute the way I read it. That's correct. But if they read it the way you read it, it seems to me there would have been a lot of cases making the point, and they all would have had to assume that the word subparagraph in the statute, as then written, merely referred to clause (ii).

MR. BLANKINGSHIP: That -- that was the assumption that was made at that point, and the Fourth Circuit followed that assumption.

JUSTICE STEVENS: That that applied only to clause (ii)? That there was no cap on (i)?

MR. BLANKINGSHIP: No. No, I'm sorry, Justice Stevens. That -- that it was applying to both of them.

JUSTICE STEVENS: Right.

MR. BLANKINGSHIP: But that was an assumption, and as -- and as Judge Luttig pointed out, that was the assumption of the Fourth Circuit at the time, but when it got a new piece of evidence, when the statute was amended and added (iii), it explained clearly that the assumption was debunked.

JUSTICE STEVENS: Do you think your position would have even been plausible before (iii) was added, if the word subparagraph meant only clause (ii)?

MR. BLANKINGSHIP: Yes, I do. I do think it -- it is possible because --

JUSTICE BREYER: So, in other words, if that's right, I guess when I go get a mortgage -- this is before. I get a mortgage and say it's a half a million dollars, and the finance charge is over 30 years. It's probably $600,000 or so. And some technical mistake is made and Congress would have wanted me to collect $1,200,000 in

damages. That's what you're saying?

MR. BLANKINGSHIP: No. That's -- that's not correct. It would not have happened that way because there is a cap under (i).

JUSTICE BREYER: No, no. Under (i) there's a cap?

MR. BLANKINGSHIP: Under (i) there's --

JUSTICE BREYER: Before. The older statute?

MR. BLANKINGSHIP: That's correct.

JUSTICE BREYER: What was it?

MR. BLANKINGSHIP: It's $25,000. The maximum amount financed. If you finance a car for $26,000, there are no remedies --

JUSTICE BREYER: So the maximum amount financed on my house was $1,000,000. I'm saying if I got a mortgage before they added paragraph (iii), how did it work? I get a mortgage on my house. There's a finance charge. It's over 30 years. It's a huge amount of money. And before, I -- I guess on your reading of it, I could have collected millions. But nobody thought that was possible.

MR. BLANKINGSHIP: No. It -- it -- prior to that, it did not apply.

JUSTICE BREYER: Didn't apply to mortgages at all?

MR. BLANKINGSHIP: No. No, Your Honor, and --

JUSTICE BREYER: Okay. That's the answer. Fine. I got the answer.

Now we have a mortgage because (iii) brings mortgages in.

MR. BLANKINGSHIP: Correct.

JUSTICE BREYER: And closed-end mortgages fall under (iii).

MR. BLANKINGSHIP: Second mortgages.

JUSTICE BREYER: Second. What about an open-ended mortgage? What about -- what about a home equity mortgage?

MR. BLANKINGSHIP: Well, it's a closed-end.

JUSTICE BREYER: All right. So home -- home equity mortgages, do they fall under (i)?

MR. BLANKINGSHIP: They -- no. They would be -- they would fall under (iii). It says or.

JUSTICE BREYER: No. It says closed. It says non-open-ended. It says under an open end -- not under an open end credit plan.

MR. BLANKINGSHIP: That's correct --

JUSTICE BREYER: So if it's under an open credit plan, i.e., a home equity mortgage, it's under (i).

MR. BLANKINGSHIP: Correct.

JUSTICE BREYER: Correct. Okay.

So I can just replicate my example. Right now, we have finance charges on those things. They can be hundreds of thousands of dollars. And you're -- you're saying that I guess we could. Am I right? That's why I'm asking it.

MR. BLANKINGSHIP: No. I -- I believe that's incorrect --

JUSTICE BREYER: Because?

MR. BLANKINGSHIP: -- in that it would not have applied to over $25,000 at the time.

JUSTICE BREYER: Under (i). So we're talking about the range of $25,000, $50,000 doubled.

MR. BLANKINGSHIP: Right.

JUSTICE BREYER: Okay.

MR. BLANKINGSHIP: Subsection (iii) was a completely different set to deal with the --

JUSTICE BREYER: I'm trying to figure out what the range is on your reading under (i), and what I -- I've been telescoping my questions. But I've come away with the impression that we're talking finance charges, if your reading is correct, in the range of $25,000, which would mean the damages would be $50,000, if you double it.

MR. BLANKINGSHIP: No, no.

JUSTICE BREYER: No. Okay. What is it?

MR. BLANKINGSHIP: The amount financed. I'm

sorry. I misspoke. The amount financed. It's not the finance charges. It's the amount financed is $25,000. As a result, you're looking at obviously much less during that period of time.

Also under (i), you have a limited statute of limitation of 1 year. So you're not going to be able to come back 10 years later and say, gee, I want all my finance charges back.

JUSTICE BREYER: Okay. Thank you. You've answered my question.

MR. BLANKINGSHIP: Petitioner argues that the term subparagraph, as used in TILA, always -- always -- means the capital letter. That is not correct. If the Court looks at the brief filed by the petitioner on page 23 --

JUSTICE GINSBURG: I don't believe they said always. They said Congress sometimes doesn't use this. Sometimes they make mistakes. I thought they said this is generally the way it is, not that it's always this way.

MR. BLANKINGSHIP: That's correct, Justice Ginsburg. Generally throughout the -- the U.S. Code, they -- they argue that specifically within TILA that it has never been used to mean something else. There is an example that they have cited that -- that supports their position, and that's 1637a(a)(6)(C). And if you look at

that portion of the Federal Truth in Lending Act, it only has the following language. Under the capital letter C --

JUSTICE SCALIA: Does this appear somewhere in the papers?

MR. BLANKINGSHIP: No. This was cited by them in their footnote.

JUSTICE SCALIA: But you're citing them. Okay. You're going to read it. I'll close my eyes and listen.

(Laughter.)

CHIEF JUSTICE REHNQUIST: What are you reading from?

JUSTICE SCALIA: He's -- nothing.

MR. BLANKINGSHIP: From -- from the statute itself, 1637a.

CHIEF JUSTICE REHNQUIST: And where is that in the briefs?

MR. BLANKINGSHIP: It is not in the -- it is cited in a footnote to support the proposition that --

CHIEF JUSTICE REHNQUIST: Where is the footnote?

MR. BLANKINGSHIP: It is on page 23.

CHIEF JUSTICE REHNQUIST: It's just cited. It's not set out in haec verba?

MR. BLANKINGSHIP: No. No, Your Honor. It -- it's set out as -- as a string of cites to support the

proposition that Congress, in enacting TILA, never used the term, this subparagraph, in an improper way. And if you look at that section, the only language in that section is capital (C) -- retention of information is the identifier. And the language says, a statement that the consumer should make or otherwise retain a copy of information disclosed under this subparagraph. Period. That's it. That's all that appears under (C).

JUSTICE BREYER: All right. Can I -- maybe you can help me with this because --

JUSTICE SCALIA: Wait. I -- I want to hear more. What does -- what does this prove?

MR. BLANKINGSHIP: It proves that it clearly could not be referring to the capital letter (C). It must be referring to --

JUSTICE SCALIA: No, because (C) doesn't do anything.

MR. BLANKINGSHIP: (C) doesn't have any requirements.

JUSTICE SCALIA: Just read it -- read it once more, would you?

MR. BLANKINGSHIP: Certainly. A statement that the consumer should make or otherwise retain a copy of information disclosed under this subparagraph.

JUSTICE SCALIA: It couldn't be under (C).

Right?

MR. BLANKINGSHIP: It couldn't be possible. Correct. So there are examples when Congress drew --

JUSTICE STEVENS: Yes, but it is true if you look at that footnote -- is it not correct, though, looking at that footnote, that the statute does repeatedly use a capital letter to describe what is clearly a subparagraph?

MR. BLANKINGSHIP: Well, there are -- I agree with that. Yes, it does a number of times. But you also see down in the bottom of the footnote, some of them, under subparagraph (A)(iii) where it's being more specific.

The problem in this case is that the term, this subparagraph, doesn't have anything to modify it to explain exactly what it's supposed to mean.

JUSTICE STEVENS: In other words, you're saying the -- we should read this as though it said, under this subparagraph (2)(A)(ii).

MR. BLANKINGSHIP: If it said that, I don't think we'd have a dispute here. That would be clear.

JUSTICE BREYER: The difficulty that I'd like you to -- for me. I'm not speaking for anyone else. But when I read a statute, I first read it usually with what I call the approach of an English-speaking Martian, a person

who doesn't know any of the context. I just read the language. And if I were just reading the language, I would think you have maybe the better of the argument. But the language does support their position in the sense that theirs is a possible reading, not maybe the most natural for our English-speaking Martian, but nonetheless a possible reading.

And then they bring in all these other claims. First, it really doesn't make sense to have a cap on everything and not (i). Second, that isn't obviously what anybody thought was the case before this. Third, there was nothing in the legislative history. Fourth -- I mean, you know, fifth, sixth, seventh. And by the time I'm finished with it, I'm ready to abandon my English-speaking Martian point of view and ask what was the human purpose underlying the statute and does the language support it. Now, that's what I'd like to hear your answer to.

MR. BLANKINGSHIP: Well, the Fourth Circuit looked at that, and they looked at the language on how it was going to work together. And they found that it was the only way to put a square peg in a square hole.

Petitioner argues that we should put a round peg in a square hole. We should ignore the conflict with (iii). We should ignore the fact that it has completely different requirements and completely different limits,

and we should then try to treat it as a carve-out of (i), but the problem with that language is the or. It doesn't say and. It doesn't say an alternative. It says or.

JUSTICE SCALIA: You're --

JUSTICE BREYER: -- thinking it's --

JUSTICE SCALIA: -- you're getting back to the language. Why don't you talk about some of the other points that Justice Breyer was raising? What about the purpose? What purpose would there be not to have a limit on little (i) and have it on the other two? Why -- why would it make sense?

MR. BLANKINGSHIP: Well --

JUSTICE SCALIA: Is there no reason why it would make sense?

MR. BLANKINGSHIP: There's only one limit. If -- if you read the statute our way, there's only one limit in -- in (ii). There is no limit on (i). There's no limit on (iii). The fact that Congress decided to treat leases somewhat differently does not necessarily mean --

JUSTICE BREYER: What do you mean there's no limit on (iii)? I thought it said $200 or $2,000.

JUSTICE SCALIA: Right.

MR. BLANKINGSHIP: Right, but it's not a limit to anything. That is the damage. It's not a limit. It's not you get the finance charge or something else. You

see, there -- there's only one that has two options, and that's (ii). All the rest have one option. It's very clear. Under (i), it's two times the finance charges.

One of the things --

JUSTICE BREYER: Yes, but he's asking what the purpose of this would be for these mortgages, you know, which is a pretty big deal, a mortgage, you know, really putting a lot at risk when you get into a mortgage. There's a limit of $2,000. Indeed, it's only $2,000, or whatever it is. No -- no -- you can't get more than that.

And as to (ii), there's the limit we're talking about, and why would anybody want (i) to be limitless? That's the question. I'm not saying there's a no answer to it. I want to hear the answer.

MR. BLANKINGSHIP: Okay. In (iii), the amount of $200 to $2,000 is simply the icing on the cake. It is not the cake. The cake is the ability to rescind the transaction within 3 years and get all of your money back, which is not an option under (i). (i) has only the cake, which is the two times the amount of the finance charges. It's the only damages you get there. Under (iii), it's just an additional bonus damage.

JUSTICE GINSBURG: May I stop you there? I thought you could get actual damages. Isn't that the first thing, if you could prove actual damages, you get

actual damages?

MR. BLANKINGSHIP: Yes, Justice Ginsburg, you can. It does say that -- that it's the sum of, and all of them are added together.

JUSTICE GINSBURG: So all -- all these cases are cases in which you couldn't prove any actual damages.

MR. BLANKINGSHIP: Well, the problem is that it's very difficult to prove actual damages under the Federal Truth in Lending Act because there is that requirement that you go and show that you could have gone somewhere else and gotten a better deal, which by the time the consumer comes to the lawyer, that time has passed. It never happens. And as a result, there are almost no cases that involve actual damages under (i). The only damages you can get under (i) are the statutory damages.

JUSTICE SOUTER: All right. But let's -- I mean, start --

JUSTICE STEVENS: Didn't you get actual damages in this case?

MR. BLANKINGSHIP: I'm sorry.

JUSTICE STEVENS: Didn't you get actual damages in this case?

MR. BLANKINGSHIP: No, Justice Stevens, we did not. We only got the statutory damages.

JUSTICE SOUTER: Start from your own analysis.

There's something very odd about saying that when there has been a violation involving a mortgage transaction, you can only get $2,000, but a violation in a conventional bank financing or a finance company financing or a dealer financing of a chattel transaction, the sky is -- is the limit. There's just something very strange about that. Most houses cost more than most cars. It is odd that you would have the limitation on the potentially larger damages and no limitation -- or, let's say, recovery just as a -- a generic term -- but no limitation on the damages in what normally is -- is a smaller transaction. How do you explain that oddity?

MR. BLANKINGSHIP: I disagree that there are no limitations. There are a number of limitations under (i). (i) is the hardest of all of the three to prove and succeed. The first limitation is the amount financed cannot be more than $25,000. In the case of somebody who buys a car with good credit, they have 0 percent, 0.9 percent financing. Their damages would be very small.

JUSTICE SOUTER: Well, they do -- they happen to be right at this moment in the business climate, but that is not the characteristic climate in which this act has operated over the years and presumably will operate again as interest rates start their way back up.

MR. BLANKINGSHIP: But the -- the cap is the

amount of the finance charges, the total amount of the finance charges. So if you start with a principal balance of $25,000, even if you have a very high interest rate like Mr. Nigh's, over 20 percent, the damages are not going to be even half of -- in this case, it was $12,000. It's less than the half of the maximum. So there is a cap. There are a number of caps.

JUSTICE SOUTER: Well, but there's a cap, but he's still going to get more money than he would be if exactly this same kind of behavior had taken place with respect to the financing of a mortgage on a half a million dollar house.

MR. BLANKINGSHIP: I -- I disagree.

JUSTICE SOUTER: That's strange.

MR. BLANKINGSHIP: I -- I disagree with that analysis because under subsection (4), you're going to be able to go back and demand rescission. You're going to be able to get all of your money back. You will get much more under the home mortgage situation.

JUSTICE SOUTER: Well, but getting all of your money back is -- is presumably going to make you whole so far as the transaction is concerned, and we have to assume that allowing the transaction under (i) is going to keep you whole so far as the transaction is concerned. The -- the issue is what do you get in addition to remaining

whole or steady with respect to the value of the transaction. And when we ask that question, the potential for recovery under (i) is significantly greater than the potential for recovery under (iii), even though (i) tends to be a smaller transaction, (iii) a bigger one.

MR. BLANKINGSHIP: Well, in -- in this case, in Mr. Nigh's case, he was not made whole. In this case, he had two cars that were repossessed from him, and that was not something that the Federal Truth in Lending Act could -- could resolve. When he came out of this case, he was much worse than he was when he went in. He now has two repossessions on his credit. So I -- I wouldn't suggest that he's --

JUSTICE SOUTER: No. Your -- your -- there's no question that -- that in -- in this -- in the case of your client, he's got problems that this act really does not address. But the question what we've got is what does the statute normally address, and I still find something anomalous in the normal operation as you describe it. What am I missing?

MR. BLANKINGSHIP: Well, under the Truth in Lending Simplification Act of 1980, Congress came back and put a number of limits on (i) that did not apply to (iii), but do apply to (i). And you can't get violations for technical wording, misuse of the wording. Under (i), the

only one -- the only way you can get damages is to prove that one of the magic numbers, the amount financed, the finance charge, the APR, or that they failed to give you the disclosures altogether. Only under those situations, do you even qualify to get the statutory damages. It's very limited and it's very difficult.

It's not a simple mathematical error, which is what happened prior to the Simplification Act. In the Mars case and the other -- in the Dryden case, those were simple mathematical errors. They were -- or just misrepresentations as to the wording of the -- of the disclosures under the Federal Truth in Lending Act. That's not the case now. Those will no longer provide statutory damages. You must prove that they have done something wrong.

And in this case, the proof was that they added a silencer that Mr. Nigh never wanted, that he didn't want, and in fact, they had packed this into the loan 3 days before they brought him back in.

JUSTICE SCALIA: Mr. Blankingship, I thought that part of your response to Justice Souter would have been that there's nothing anomalous about imposing a dollar limit on massive transactions and not imposing a dollar limit on smaller transactions, that that is precisely what you would expect Congress to do. The --

the need for a dollar limit on -- on home mortgages is -- is obvious, and the need for a dollar limit on -- on smaller loans is less obvious.

MR. BLANKINGSHIP: I would agree.

JUSTICE SOUTER: But if that is the answer, you're still left with the situation, as I understand it, in which the recovery under the small loan is going to be potentially in, I suppose, many cases practically bigger than the recovery under the large loan. And that still seems cuckoo to me.

MR. BLANKINGSHIP: It -- it is possible there are, but there are so many different variables. It can be that way. In a 0 percent financing chance, it will not.

JUSTICE BREYER: Of course, in (ii), it's -- it's covered. You have a -- on your theory of it, small (ii), (ii), is also limited. And that's only $25,000, I gather, as well.

MR. BLANKINGSHIP: Of the amount due on the lease, yes.

JUSTICE BREYER: Yes.

MR. BLANKINGSHIP: It's a little bit different.

JUSTICE BREYER: So it -- so it's -- so you'd have to say Congress wanted to impose a limit on these small (ii) $25,000 or less transactions, but they didn't want to impose any limit on the small (i) $25,000 or under

transactions. Is that right?

MR. BLANKINGSHIP: Well, I think that's -- that's potentially right. And there's a big difference between (i) and (ii) also. Under (ii), the statute of limitations is 1 year after the lease expires. Thus, if you were to lease a car for 4 or 5 years, you have a 5- or 6-year statute of limitations. Under (i), it's much more limited. You have a 1-year statute of limitations. It is the most difficult.

JUSTICE SOUTER: Let me -- let me ask you a question which you are free to decline to answer because it -- it rests upon an assumption that you don't make but the Fourth Circuit did make, and if you say, look, I don't want to defend the Fourth Circuit on this, okay with me.

JUSTICE SCALIA: Don't answer.

(Laughter.)

JUSTICE SOUTER: The --

MR. BLANKINGSHIP: I think I know where you're going too.

JUSTICE SOUTER: -- the Fourth --

JUSTICE SCALIA: I've never heard counsel refuse to answer. I would just like to see it happen.

(Laughter.)

JUSTICE SOUTER: The -- not refuse to answer. Exercise an option not to answer.

(Laughter.)

JUSTICE SOUTER: The Fourth Circuit made the assumption that prior to the addition of (iii), the -- the $100,000 minimum and -- and cap applied to -- to both little (i) or little (i) and little (ii). And you -- you have argued that that really isn't a sound assumption. But if you -- if you start where the Fourth Circuit did in making that assumption, then there being no reenactment of (i) and (ii) when (iii) was added, the Fourth Circuit position has got to, I think, encounter the -- the general presumption against repeals by implication. And on the Fourth Circuit's theory, the -- the threshold cap applied to -- to Roman little (i), and without any reenactment or anything, suddenly it no longer did. There was no express provision to that effect. There was nothing in the legislative history to indicate that that was intended, and it seems to me that there is a -- a difficult repeal by implication problem here. Is -- is there an answer to that problem?

MR. BLANKINGSHIP: Well, I -- I think in the United Bank v. Wolas case, where the Court held that the fact that Congress may not have foreseen the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning, is -- is probably the answer to the question. Congress may not

have intended or maybe they did intend.

JUSTICE SCALIA: That's not the answer. The -- the answer is that it is not implication, that there is a new statutory text which, if it means what you say it means, has expressly repealed the earlier one. Now, if it doesn't mean what you say it means, then I guess it's by implication. But if it means what you say it means, there's no implication. There's a statutory text which means something different from what the prior text meant, and that's a repeal.

MR. BLANKINGSHIP: And that's -- I absolutely --

JUSTICE SOUTER: If this is an express repeal, you win.

(Laughter.)

JUSTICE STEVENS: Let -- let me just make sure I understand. You seem to have taken two different positions. Do you think subparagraph (i) -- I mean, clause (i) and clause (ii) mean the same thing or something different than they did before 1995?

MR. BLANKINGSHIP: I'm not sure I understand the question.

JUSTICE STEVENS: Did the -- did the 1995 enactment, which added clause (iii), did that change the preexisting meaning of (i) and (ii)?

MR. BLANKINGSHIP: Yes, by its -- by its

language, by its introduction.

JUSTICE STEVENS: So then you're agreeing that prior to the 1995 amendment, your opponent's reading of -- of (i) and (ii) would have been correct.

MR. BLANKINGSHIP: I would agree that that's what the law was and that's what had been stated before. I think if you go back and -- and the other problem with these -- these statutes or these -- these prior cases --

JUSTICE KENNEDY: Is it relevant that all that Congress did was added (iii)? It didn't reenact (i) and little (i) -- (i) and (ii)?

MR. BLANKINGSHIP: No. The statute then becomes what it is. I think that -- that the Fourth Circuit did precisely what it was instructed by this Court to do, which is to look at the statute the way it is enacted in front of it today and to read that statute and to try to find a way to make a fit. And in this case they found that it was a square peg in a square hole, that everything fit, as Justice Scalia --

JUSTICE KENNEDY: So Congress basically left (i) or (i) and (ii) alone.

MR. BLANKINGSHIP: They did leave them alone, as they have in -- in a lot of these amendments. They come and add different things. They don't necessarily change them.

But in this case, you have to look at the statute we have before us, and under that particular statute, it's clear that it can't work where the -- the limiter on (ii) applies to (i) and (ii), but not to (iii). If it applies to all of (A), then it must apply to (i), (ii), and (iii), not just to (i) and (ii). And thus, that's why the Fourth Circuit said we cannot apply it this way. It does not make sense. If it is -- subparagraph is all of (A), then there's a clear conflict with (iii), and which petitioners then go and argue, well, now we'll explain it as a carve-out, but the carve-out argument loses, I submit, because of the or.

JUSTICE BREYER: No, because of the or. Because of little (iii), (iii). Take out (iii) and it all makes sense. What it says is to the whole subparagraph damages are limited to $1,000 or if it's the special real estate thing, they're limited to $2,000. And if that little (iii) weren't there, it would be clear. But the little (iii) is there, and you say, well, maybe sometimes we can say a little (iii) is superfluous. It's not a word, after all.

JUSTICE KENNEDY: And -- and all Congress did was add (iii), it didn't reenact the whole section.

MR. BLANKINGSHIP: It did not reenact the whole section. That's correct.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Blankingship.

Mr. Ayer, you have 7 minutes remaining.

REBUTTAL ARGUMENT OF DONALD B. AYER

ON BEHALF OF THE PETITIONER

MR. AYER: Thank you, Your Honor.

I just have a short list of things I'd like to address.

The first is just to repeat that the last time Congress enacted the word subparagraph in this provision was in 1974. I don't understand why the 1995 amendment is not simply subsequent legislative history. It tells us nothing about what Congress meant in 1974.

The second point is, Justice Scalia, I'd like to -- I wasn't quick enough to think when you said before that if you read the way the Fourth Circuit did, there's no inconsistency. Indeed, not. There is still an incongruity between clause (i) and clause (iii) because contrary to what Mr. Blankingship has said, ever since the beginning of TILA, mortgage transactions have been covered by the Truth in Lending Act, I can assure you. And prior to this addition in 1995, they were dealt with in clause (i). And so what -- what you've got here is a provision that says, with regard to loans in general, the cap is --

you know, it's twice the -- the finance charge, and -- and then whatever we --

JUSTICE BREYER: Oh, so I was -- I'm sorry. That was the one thing I was trying to clarify in this that I thought I had -- that I didn't understand --

MR. AYER: Right.

JUSTICE BREYER: -- is before this (iii) came about, where was my normal home mortgage? Was it covered or not?

MR. AYER: It was in (i), Your Honor.

JUSTICE BREYER: If it was in (i), then how -- but he says at 1603, there's a $25,000 limit on what's in (i).

MR. AYER: 1603, Your Honor, specifically says that credit transactions, other than those in which a security interest is or will be acquired in real property.

JUSTICE BREYER: Are limited to $25,000?

MR. AYER: Correct, Your Honor.

JUSTICE BREYER: Oh, so then -- then I'm back the opposite of what I was thinking. In other words, you're saying that -- that prior to -- prior to the reenactment -- I'm sorry. This is the one thing I was trying to clarify in this oral argument. Prior to the -- prior to the enactment of the new amendment, your secured mortgage transaction is up in (i).

MR. AYER: Correct.

JUSTICE BREYER: Okay. And then after, although the non-open-ended one is in (iii), my home equity loan is in (i).

MR. AYER: You bet, Your Honor.

JUSTICE BREYER: And so, in fact, if I have, say, a balance of a couple hundred thousand dollars of home equity borrowing over, say, 10 or 15 years, I could have a total finance charge of hundreds of thousands.

MR. AYER: Absolutely. That's correct.

I want to just say a word about the facts, although frankly I think they're utterly irrelevant. But the facts here are that summary judgment was entered against Mr. Nigh on 40 or so claims. Three went to trial. Among the claims on which summary judgment was entered were claims for fraud and claims for breach of contract. The reason that no damages -- no actual damages were not given was not because they weren't available. They were available. They just weren't proven. There were no actual damages proven. Actual damages are always available even for technical TILA violations, technical in the sense that they're within the group that are said to give rise to a violation under 1640(a). I do want --

JUSTICE GINSBURG: Mr. Blankingship said that as a matter of fact, it's rare that under TILA people are

able to prove actual damages. Is that so?

MR. AYER: That may be true, Your Honor. I -- I think there's a question of how one goes about doing that, and you have to actually show harm. And so, you know, the question is how do you prove that and in what kind of a case.

I do want to say and be clear -- I think I said earlier that in 36 of 37 uses in TILA, the meaning is clear and refers to -- subparagraph is used to refer to a capital letter. The 37th is not clear. In fact, I would agree with Mr. Blankingship's reading of it. But 36 out of 37 ain't bad, particularly when we know in 1974 exactly what they meant to do.

The -- the last point I guess I just want to sum up by saying is that I think this case really has a lot in common with the parable of the elephant and the blind man. And when a blind man examines an elephant's leg and decides that it's a tree, maybe it's because he hasn't been able to -- to discern what else is out there and consider what other considerations there are. And in this case I think clearly what we have is a case where simply reading a single sentence of a statute and thinking you know what it means and militantly refusing to look anywhere else will very likely lead you to the wrong answer in many cases.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.

The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)